

Office of Chief Counsel  
Internal Revenue Service  
**Memorandum**

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Third Party Communication: None  
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date: November 30, 2009

to: Lois Lerner  
Director, Exempt Organizations

from: M. Grace Fleeman  
Senior Technical Reviewer, Branch 1  
(International)

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subject: Notice of Withdrawal of Private Letter Ruling Request

In accordance with section 7.07(2) of Rev. Proc. 2009-1, 2009-1 I.R.B. 1, we are providing you with notification of a Private Foundation withdrawal of a private letter ruling request. On September 1, 2009, the Private Foundation's representative withdrew the above-referenced request for a private letter ruling after this office advised such Private Foundation and its representative of its tentative conclusion. Following is a brief discussion of the issue, facts, applicable law, and the reason for this office's tentative conclusion. A copy of the Private Foundation's request is attached. This memorandum is not binding on Examination or Appeals and is not a final case determination. This document may not be used or cited as precedent.

LEGEND

Private Foundation =

Act =

Year 1 =

Date 1 =

## ISSUE

Whether the U.S.-U.K. income tax treaty (the “Treaty”) exempts Private Foundation from the federal excise tax imposed on U.S. source dividend income under section 4948(a) of the Code.

## CONCLUSION

Based solely on the facts submitted and the representations made, we tentatively conclude that the Treaty does not exempt Private Foundation from the federal excise tax imposed on U.S. source dividend income under section 4948(a). Further, the section 1443(b) withholding tax applies to income of a foreign organization subject to tax imposed by section 4948(a).

## FACTS

Private Foundation was established as a charitable trust in the United Kingdom in Year 1 to foster and promote certain types of research, and is governed by the Act. Private Foundation is recognized as a charity for U.K. tax purposes by the U.K. tax authorities. On Date 1, Private Foundation received a written determination letter from the Internal Revenue Service that it is an organization described in section 501(c)(3) of the Internal Revenue Code (Code). As a section 501(c)(3) organization, Private Foundation is generally exempt from federal income tax under section 501(a) of the Code. Further, the written determination letter stated that Private Foundation is a private foundation within the meaning of section 509(a) of the Code.

As a foreign private foundation, Private Foundation is subject to section 4948(a) of the Code, which generally imposes a four percent annual excise tax on a foreign private foundation’s gross investment income derived from sources within the United States. Gross investment income for purposes of section 4948(a) includes the portion of Private Foundation’s operating income from U.S. source dividends. Therefore, absent an applicable treaty exemption, Private Foundation is subject to the four percent excise tax on its U.S. source dividend income pursuant to section 4948(a) of the Code. The United States has an income tax treaty in force with the United Kingdom.

## LAW AND ANALYSIS

Article 2(3)(a)(ii) of the Treaty provides that federal excise taxes imposed with respect to private foundations are included as existing taxes to which the Treaty applies. The Treasury Department Technical Explanation to Article 2 of the Treaty clarifies that the federal excise taxes imposed with respect to private foundations are those taxes imposed under sections 4940 through 4948. Section 4948(a) imposes a four percent annual excise tax on a foreign private foundation’s gross investment income derived

from sources within the United States. Gross investment income includes, among other items of income, U.S. source dividends for purposes of section 4948(a).

Section 1443(b) imposes a withholding tax on items of income paid to a foreign organization that are subject to the excise tax under section 4948(a). The withholding tax is equal to the four percent tax imposed under section 4948(a).

Article 10(2)(b) of the Treaty provides, in relevant part, that dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State the tax so charged shall not exceed 15 percent of the gross amount of the dividends in all other cases.

Generally when a tax is listed as a covered tax under Article 2, the Contracting State that normally may impose such tax will agree to limit its right to impose the tax, unless such right has been retained within the Treaty. Even though the excise tax under section 4948(a) is a covered tax within the meaning of Article 2 of the Treaty, the United States has retained its right to impose the tax pursuant to Article 10(2)(b) of the Treaty. Under Article 10(2)(b) of the Treaty, the United States has retained its right to impose a tax not to exceed fifteen percent of the gross amount of U.S. source dividends. Article 10(2)(b) of the Treaty is not limited to income taxes but may also include excise taxes, so long as the aggregate amount of the tax does not exceed fifteen percent.

Thus, nothing in the Treaty exempts Private Foundation from the four percent excise tax imposed under section 4948(a). Further, section 1443(b) applies a four percent withholding tax to items of income of a foreign organization subject to excise taxes imposed under section 4948(a).

## CASE DEVELOPMENTS, HAZARDS AND OTHER CONSIDERATION

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call \_\_\_\_\_ at \_\_\_\_\_ if you have any further questions.